Shifting the emphasis from investment protection to liberalization and development

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Shifting the Emphasis from Investment Protection to Liberalization and Development: The EU as a New Global Factor in the Field of Foreign Investment

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I. INTRODUCTION

A. *COMMUNITY AGREEMENTS AS AN INDICATOR OF THE ROLE OF THE EU IN THE FIELD OF FOREIGN INVESTMENT*

The role of the EU[1] as an international actor in the field of foreign investment was largely unnoticed until very recently, when the interrelationship between Community and international investment law acquired renowned interest. Community law has been used for challenging the Member States' presence in the field of foreign investment, questioning the validity and applicability of the Bilateral Investment Treaties (BITs) between EU Member States and with third countries.[2] In addition to posing restrictions on Member States' powers, the EU is also gradually perpetuating a more active role in the field of foreign investment, asserting its own competence in the field of foreign investment, which is for the first time explicitly recognized in the Lisbon Treaty.[3]

However, the interest of the EU in foreign investment is not a new phenomenon. Acknowledging the importance of international regulation of foreign investment the EU has gradually attempted to assert its own presence as an international actor in the field of foreign investment regulation. In fact, the EU has incorporated provisions on foreign investment in the Association Agreements that it has concluded with third countries (henceforth and for the purposes of this article EC IIAs), highlighting the role of foreign investment in EC external relations. Foreign investment provisions are found in

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[1] In this article the term European Community (EC) will be used for identifying the legal person concluding IIAs and the term European Union (EU) will be used more broadly, referring to broader EU policy objectives, the Member States and their nationals.

[2] The possible interactions between BITs and Community law have been indicated in a number of recent disputes, such as the *Eastern Sugar* award and Cases C-205/06 *Commission v. Austria* and C-206/06 *Commission v. Sweden* [2009] ECR 1-0000. For a discussion of these cases see M. Burgstaller, *European Law and Investment Treaties*, 26 Journal of International Arbitration 181 (2009); T. Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46 Common Market Law Review 383 (2009); H. Wehland, *Intra-EU Investment Agreements and Arbitration: Is European Community Law an obstacle?*, 58 International and Comparative Law Review 297 (2009).

[3] Article 207 on the Treaty on the Functioning of the European Union provides explicitly that the Common Commercial Policy covers foreign direct investment. See also below part III.A.

agreements with countries aiming at future accession to the EU, such as the Stabilization and Association Agreements (SAAs) with Balkan countries,[4] in agreements with neighbouring countries aiming at enhanced economic and political cooperation, such as the Euro-Mediterranean Agreements and the Partnership and Cooperation Agreements,[5] and in 'pure' economic and free trade agreements that the EC has concluded with other countries, such as those with South Africa, Mexico and Chile and CARIFORUM States.

Thus, an examination of EC IIAs sheds light to the increasing importance that foreign investment acquires in EC external relations, contributing to a better understanding of the existing regulatory framework and indicating, to a certain degree, the future orientation of the emerging EC foreign investment policy. Given the diversity of the objectives of these agreements and the different approaches that they adopt with regard to economic integration and association and the rapid evolution of investment provisions through time, an analysis of the scope of all foreign investment provisions found in these agreements would be rather lengthy. For the purposes of this article, it would suffice to focus on the latest Economic and Partnership Agreement with CARIFORUM States (hereinafter EPA),[6] because it incorporates the most comprehensive and extensive provisions on foreign investment, thus setting a model for future EU agreements, and also because it was concluded with countries that do not have far-reaching integration objectives, thus the investment provisions do not bear close resemblance to the EC Treaty provisions that cover intra-EU investments.

B. *SKETCHING THE DIFFERENCES BETWEEN EC IIAS AND BITS*

The basic characteristic that renders the examination of EC IIAs interesting is that the legal framework on foreign investment promotion and regulation in EC IIAs presents remarkable differences from BITs and other IIAs. Instead of focusing on investment protection, EC IIAs link foreign investment regulation with market integration and development principles, indicating that the EC promotes an alternative regulatory framework on foreign investment. Such a comparison between EC IIAs and BITs becomes highly relevant, if it is undertaken in light of the objectives that international regulation of foreign investment pursues.

Indeed, the massive conclusion of BITs over the last 20 years, which amount today to more than 2,600,[7] has been routed in the belief of states that BITs contribute to their

[4] The EU has concluded Stability and Association agreements with Albania, Bosnia and Herzegovina, Croatia, Montenegro, Serbia and the Former Yugoslav Republic of Macedonia.

[5] The EU has concluded Euro-Mediterranean Association Agreements with Algeria, Egypt, Israel, Jordan, Palestine, Morocco, Tunisia and has recently concluded the negotiations with Syria and Partnership and Co-operation Agreements with Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Ukraine and Uzbekistan.

[6] Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other Part, concluded on December 21st 2007, available at http://ec.europa.eu/trade/issues/bilateral/regions/acp/pr220208_en.htm. The CARIFORUM States are a regional grouping of 15 Caribbean countries, namely Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Gyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Surinam, Trinidad and Tobago.

[7] UNCTAD, *IIA Monitor No.2 2008*, Recent developments in international investment agreements, available at http://www.unctad.org/en/docs/webdiaeia20081_en.pdf (last visited 18th November 2009).

development, advancing investment flows and providing benefits arising from foreign investment activity.[8] Recognizing the positive impact of foreign investment flows on economic growth and development,[9] most countries have been eager to develop a legal framework regulating foreign investment so as to attract foreign investment and ensure benefits arising from foreign investment activity.

Although BITs have been successful in offering foreign investors a significant tool for protecting their investments, it is controversial whether and to what extent they have managed to achieve the main goal that led most countries in concluding them, namely contributing to the promotion of foreign investment and the advancement of foreign investment flows.[10] Focusing mainly on protection against expropriation, BITs have been unsuccessful to address other, equally or even more important regulatory determinants of foreign investment.[11] For example, the majority of BITs do not seem to take into account the emerging and evolving characteristics of foreign investment that raise particular regulatory concerns, such as the shift in most investment activities towards services.[12] In addition to their ability to attract foreign investment, BITs have been the subject of even greater scepticism regarding their role in maximizing the benefits from foreign investment activity and contributing to the development of host countries. Protection of foreign investment has given rise to challenges of national measures implementing public policies,[13] giving little space for environmental, public health, human rights or other development concerns to be taken into consideration.[14]

[8] A. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Virginia J Int'l L 640 (1998), at 680-684.

[9] On the question of whether foreign investment contributes to development see: UNCTAD, *Economic Development in Africa, Rethinking the Role of Foreign Direct Investment* (New York; Geneva: United Nations Publications, 2006); T. Moran, *Does Foreign Investment promote development?* (Washington, DC: Institute for International Economics, 2005); H. Kehal, *Foreign Investment in Developing Countries* (New York: Palgrave Macmillan, 2004); A. Bende-Nabende, *Globalisation, FDI, Regional Integration* (Aldershot; Burlington: Ashgate, 2002); K. Sauvant & J. Weber (eds.) *International Investment Agreements: Key Issues* (New York; Geneva; United Nations Publications, 2005) chapter 27.

[10] The existence of controversial empirical evidence does not necessarily question the role of international regulation as an important determinant of foreign investment flows. Without exaggerating the role of international regulation, since other factors, such as the domestic institutional and economic environment or the existence of natural resources and favorable market conditions, are important variables of foreign investment flows, the empirical evidence rather questions the suitability of the provisions of IIAs to achieve the objectives of foreign investment regulation to attract foreign investment and increase benefits from it. On the impact of IIAs on FDI flows see in particular L. Sachs & K. Sauvant (eds.), *The Impact of Bilateral Investment and Double Taxation Treaties on Foreign Direct Investment Flows* (New York: OUP, 2008); J. Salacuse & N. Sullivan, *Do BITs really work: an evaluation of bilateral investment treaties and their grand bargain*, 46 Harvard Int'l L J 67 (2005); UNCTAD, World Investment Report 2003 *FDI Policies for Development: National and International Perspectives*, at 99-145; J. Tobin & S. Rose-Ackerman, *Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties*, Yale Law School Center for Law, Economics and Public Policy Research Paper No. 293; E. Aisbett, *Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation*, MPRA Paper No. 225, March 2007.

[11] S. Griffith-Jones, *Global Capital Flows* (Basingstoke: Macmillan, 1998), at 158-160, 171-175.

[12] On the shift towards services and the regulatory concerns that it raises see: UNCTAD, *World Investment Report 2004: The Shift Towards Services* (New York; Geneva: United Nations Publications, 2004), at 147-180, 208-212.

[13] For example *Metalclad Corporation v. United Mexican States*, Award, 30 August 2000, ICSID Case No. ARB(AF)/97/1, 6 ICSID Rev.—FILJ 168 (2001); *Aguas del Tunari S.A. v. Republic of Bolivia*, Decision on Jurisdiction, 21 October 2005, ICSID Case No. ARB/02/3, 20 ICSID Rev.—FILJ 450 (2005); *Azurix Corp. v. Argentine Republic*, Award, 14 July 2006, ICSID Case No. ARB/01/12.

[14] A. Cosbey et al., *Investment and Sustainable Development: A guide to the Use and Potential of International Investment Agreements* (Winnipeg, International Institute for Sustainable Development, 2004), at 9-14; L. Peterson & K. Gray, *International Human Rights in Bilateral Investment Treaties and m Investment Treaty Arbitration* (Winnipeg, International Institute for Sustainable Development, 2005), at 6.

In light of these criticisms of BITs, this article sketches the differences of EC IIAs from traditional BITs and examines whether and to what extent they offer a "better" framework for international regulation of foreign investment in terms of addressing the goals of attracting foreign investment and maximizing benefits from it. Its objective is to determine the reasons behind and the goals of the legal framework on foreign investment in EC IIAs and to assess whether the legal mechanisms that are established therein are suitable and sufficient for achieving the envisaged objectives. In order to do so, the content of the specific provisions dealing with foreign investment, viewed comparatively, is discussed firstly, using the EPA as an example. Secondly, the reasons justifying the different scope of EC IIAs are examined, looking into the competence and policy reasons that explain the scope of EC IIAs. Afterwards, the goals that are pursued by the EU in adopting the EPA are analyzed, highlighting the emphasis placed on internationalization of foreign investment rules and the shift from protection to liberalization and promotion provisions. Finally, the last part discusses whether the scope and content of EC IIAs provisions respond effectively to the goals they set; it examines in particular whether and to what extent these provisions fulfill the objective of economic and social development, hence, offering a solution for the problems raised by BITs.

II. THE SCOPE OF THE FOREIGN INVESTMENT PROVISIONS IN THE EPA WITH CARIFORUM STATES

Respecting the freedoms and limits imposed by primary Community rules and reflecting contemporaneous political considerations on the scope and extent of legally binding obligations, as will be discussed in part III, the EPA presents a unique model of international regulation of foreign investment which departs from the traditional BIT form. Drawing influences from the GATS provisions on commercial presence, the EPA presents significant differentiations in comparison to BITs.

Starting with the definition of foreign investment, a first striking difference from BITs is that the EPA distinguishes between foreign direct investment (FDI) and other forms of investment, most importantly, portfolio investment. Unlike BITs which include a broad, all embracing definition of investment, the EPA deals separately with FDI and portfolio investment, providing a different set of rules for the establishment and the treatment of foreign direct investment.[15] Although this distinction may be justified with regard to the admission of foreign investment, since the admission of direct investment poses additional regulatory concerns in comparison to short-term investments,[16] such

[15] Article 65 of the EPA contains the definition of an 'Investor' and 'commercial presence', indicating that the following provisions relate only to foreign direct investment. In other EC IIAs portfolio investment is usually considered under their capital movements provisions, but Article 123(1) of the EPA is clear that free movement of capital provisions concern only movements related to direct investment, thus excluding portfolio investment from the scope of the EPA.

[16] Regulation of establishment deals with the way the activity of an investor will take place, considering foreign equity ownership limitations, quantitative restrictions, administrative authorizations and restrictions on the legal form of an investment, whereas portfolio investment does not raise such concerns. I. Gomez-Palacio & P. Muchlinski, 'Admission and Establishment' in Muchlinski, Ortino & Schreuer (eds.) *Oxford Handbook of International Investment Law* (Oxford; New York: OUP, 2008), at 230-232.

differentiation is more difficult to comprehend with regard to the post-admission treatment of foreign investment, where similar regulatory concerns exist.

This distinction between FDI and portfolio investment renders clear the importance that admission of foreign investment plays in the EPA in comparison to BITs. Indeed, most BITs, in particular EU Member States' and South-South BITs, offer only partial coverage of foreign investment regulation, leaving outside their scope issues pertaining to the entry and operation of foreign investors, which remain under national regulatory control.[17] As a result, a first striking difference is that the EPA deals explicitly with the admission of foreign investment, namely the degree of liberalization of capital movements and the conditions for the establishment of foreign investors.[18] Furthermore, the EPA differentiates from BITs that include provisions on admission of investment, notably those by the US and Canada.[19] Providing for liberalization of capital movements relating to direct investments[20] and granting market access and national treatment to foreign investors,[21] the EPA addresses entry and establishment of foreign investment from a different perspective.[22]

In addition to listing the freedoms enjoyed by and the restrictions placed on foreign investors wishing to establish themselves in the host country, the EPA includes also provisions offering specific standards of treatment to foreign investors, both before and after their establishment in the host country. Similar to the BIT model of offering general, abstract standards of treatment to foreign investment, it provides for qualified Most-Favoured-Nation and National Treatment of foreign investors in the regulated sector at the post-establishment phase.[23] However, a glance at the EPA provisions on post-establishment treatment of foreign investment reveals two significant differences from traditional BITs.

Firstly, the EPA presents a strong linkage between establishment and post-establishment treatment of foreign investment. Contrary to Member States BITs, which provide standards of treatment of foreign investors at the post-establishment phase without granting any rights for admission and establishment of FDI, the EPA seems to condition the regulation of post-establishment treatment on the existence of provisions

[17] R. Dolzer & C. Schreuer, *Principles of International Investment Law* (Oxford; New York: OUP, 2008), at 107; Gomez-Palacio & Muchlinski, *supra* note 16, at 240-242.

[18] Establishment concerns the setting up and management of a primary or a dependent undertaking in the host state. On the scope and content of establishment regulation in general see UNCTAD, Admission and Establishment (New York; Geneva: UN Publications, 1999), at 1-4; J. Salacuse, 'Towards a Global Treaty on Foreign Investment: the Search for a Grand Bargain' in Horn (ed.) *Arbitrating foreign Investment Disputes* (The Hague: Kluwer Law International, 2004), at 73.

[19] On the scope of BITs including liberalizing provisions see: T. Pollan, *Legal Framework for the Admission of FDI* (Utrecht: Eleven International Publishing, 2006), at 77-85.

[20] Articles 123 and 124 of the EPA.

[21] Articles 67, 69 and Annex 4 of the EPA.

[22] See below part IV.B. For a detailed description of the content of EPA provisions see: P. Sauve & N. Ward, 'Services and Investment in the EC-CARIFORUM Economic Partnership Agreement Innovation in Rule Design and Implications for Africa' ECIPE (2009), at 11-16, 36-44 available at http://www.ecipe.org/the-ec-cariform-economic-partnership-agreement-assessing-the-outcome-on-services-and-investment/PDF (last visited 18th November 2009).

[23] Articles 68 and 70 of the EPA.

on establishment, since post-establishment treatment standards are offered only to the extent that admission of foreign investment is allowed. Nevertheless, this does not necessarily mean that the scope of post-establishment treatment of foreign direct investment is identical to the scope of establishment provisions. Although the EPA makes use of the same non-discrimination standards of treatment for the establishment and post-establishment treatment of FDI, it provides different standards of treatment at each stage for the different sectors of foreign investment.

Secondly, the EPA provides for different standards of treatment of foreign investment in comparison to BITs. Using language based on the non-discrimination principle, the EPA departs from traditional BIT language which formally vests foreign investors with other standards as well. Despite the lack of identical wording in BITs, a common standard provided in the vast majority of BITs is Fair and Equitable Treatment, while many agreements provide additional standards, such as Full Protection and Security and protection against arbitrary and discriminatory measures.[24] This lack of such standards of treatment, and most importantly of Fair and Equitable Treatment in EU IIAs appears to be limiting the scope of treatment offered to foreign investors thereunder.

However, the EPA contains innovative provisions concerning specific aspects relating to the post-establishment operation of foreign investors. Among them, the provisions on the employment of foreign key personnel are of particular importance,[25] as they cover an important aspect of post-admission operation of foreign investment in a detailed manner that is not found under most BITs.[26] Furthermore, the EPA includes a number of innovative provisions on investors' behavior, maintenance of standards as well as on general exceptions from the application of the investment rules. Building upon current BITs provisions that concern the relation between foreign investment and labour or environmental standards,[27] Articles 72 and 73 of the EPA on investors' behaviour and maintenance of standards oblige the parties to take all appropriate measures to ensure that foreign investment activity conforms to a number of standards. Addressing public policy considerations, Articles 224 and 225 enable host states to adopt under certain conditions measures pursuing specific public policy objectives that would otherwise be considered to infringe the investment provisions of the agreement.[28]

Contrary to BITs, the EPA does not deal with protection of foreign investment against expropriation. The ambiguity over the scope of EC competence to regulate the conditions for expropriation of foreign investment, as well as the lack of political will to incorporate the traditional, core aspect of international regulation of foreign investment

[24] For an enumeration of the different standards of treatment provided in BITs see Dolzer & Schreuer, *supra* note 17, Chapter 7.

[25] Articles 80-84 of the EPA.

[26] For example the US Model BIT of 2004 contains a provision prohibiting only national measures determining the nationality of natural persons having managerial positions.

[27] For example Articles 12 and 13 of the US Model BIT.

[28] For an analysis of these provisions see below part IV.C.

in EC IIAs, which would bring about significant legal and political effects on Member States' BIT and foreign investment policy in general, hindered the creation of a complete regulatory framework on foreign investment in EC IIAs. Respecting and recognizing the BITs that EU Member States have concluded with CARIFORUM countries, the EPA stops short of including provisions relating to expropriation, thus avoiding any potential conflict with them.[29]

Recognizing the prominent role of dispute settlement in foreign investment regulation, the EPA provides for the settlement of disputes arising out of the application of its foreign investment provisions. However, the dispute settlement mechanisms provided depart significantly from the well established model of investor-state arbitration that has become an essential characteristic of BITs and IIAs in general. Drawing on the WTO agreement, the EPA establishes only one dispute settlement mechanism applying to all trade and trade-related matters, including foreign investment, thus applying all elements of interstate dispute settlement to investment disputes.[30] As a result, private individuals are prevented from initiating or participating in a dispute. They are given only the possibility of submitting amicus curiae briefs,[31] thus needing to convince their home states to espouse their claim and initiate interstate settlement proceedings. Besides, private investors cannot benefit directly from the remedies provided by the agreement, which consist of the withdrawal of inconsistent commitments, compensation and retaliation in situations similar to those described in the WTO DSU. Private investors' damages are not taken into account nor does compensation present a possible remedy, thus diminishing the effectiveness of investment dispute settlement.

Last but not least, the EPA recognizes the significance of foreign investment promotion and establishes a framework for cooperation, in particular by integrating investment promotion[32] in development co-operation. Investment promotion is an important field of development cooperation, belonging to the general institutional framework that determines development cooperation. In addition to the general development cooperation framework, the EPA regards investment promotion as a specific field of cooperation, where support for technical assistance, training and capacity building is provided in order to establish mechanisms for promotion of

[29] Article 71 of the EPA provides that "*Nothing in this Title shall be taken to limit the rights of investors of the Parties to benefit from any more favourable treatment provided for in any existing or future international agreement relating to investment to which a Member State of the European Community and a Signatory CARIFORUM State are Parties*".

[30] For an overview of the dispute settlement provisions included in EC IIAs and their differences from BITs see I.G. Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lesson Learned?' in L. Bartels & F. Ortino (eds). *Regional Trade Agreements and the WTO System* (Oxford; New York: OUP, 2006), at 389 ff; E.R. Robles, *Political & Quasi-Adjudicative Dispute Settlement Models m European Union Free Trade Agreements*, WTO Economic and Research Statistics Division, Staff Working Paper ERSD-2006-09, (2006).

[31] It is noteworthy that Article 217 of the EPA explicitly secures the right for private individuals to submit *amicus curiae*.

[32] The term 'investment promotion' is used in this article in a narrow sense, relating only to the measures that affect the institutional capacity and willingness of host states to promote foreign investment and not to all measures that create favourable determinants for foreign investment, as the latter definition would include liberalizing and protection measures as well.

investment and enhance the capacities of investment promotion agencies in CARIFORUM States.[33] The inclusion of provisions on investment promotion presents an important innovation in comparison to most BITs; the latter include mainly 'best efforts' provisions, focusing on transparency of national laws and regulations, and rarely provide for general or specific investment promotion measures and policy frameworks that home and host states should adopt in order to promote foreign investment flows.[34]

Comparing the EPA with existing BITs and in particular those concluded by EU Member States, one can easily detect a shift in regulatory priorities. The EPA excludes from its scope investor-state arbitration and protection of foreign investment against expropriation, which have been the core elements of foreign investment regulation in most investment agreements. It focuses mainly on admission and treatment of foreign investment, using largely the GATS as a model for regulation of foreign investment. Indeed, the GATS has exerted significant influence on the structure, scope and content of the foreign investment provisions under the EPA, covering the same aspects of foreign investment regulation and providing for similar dispute settlement mechanisms. However, perceiving the EPA as a mere duplication of the GATS does injustice to it. The EPA has sufficient original elements that can justify its characterization as an innovative model for international regulation of foreign investment. Although it is based on the GATS, its scope is extended to cover investment beyond services sectors, it distinguishes between the different modes for supply of services in terms of structure and it includes original provisions, such as those on investors' behavior and maintenance of standards, as well as detailed provisions on issues that are deemed of greater importance, such as movement of investment related natural persons.

III. REASONS FOR INCLUDING FOREIGN INVESTMENT IN EC IIAS AND THE GOALS PURSUED BY THE EU

In order to explain the different stance adopted by the EU with regard to international regulation of foreign investment, it is necessary to explore initially the reasons that led the EU to expand and to narrow at the same time the scope of international foreign investment regulation in its IIAs. After examining the rationales underlying the scope of foreign investment provisions in EC IIAs, one has to consider the reasons for the adoption of the specific content of foreign investment provisions. In that respect, the specific policy goals pursued by the EU have to be identified and analyzed.

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[33] Article 121. See also D. teVelde and S. Bilal, 'Foreign Direct Investment in the Cotonou Agreement: Building on Private Sector Initiatives' in Babarinde & Faber (eds.) *The European Union and Developing Countries The Cotonou Agreement* (Leiden; Boston: Martinus Nijhoff, 2005), at 211-214.

[34] UNCTAD, *Investment Promotion Provisions in International Investment Agreements* (New York; Geneva: UN Publications, 2008), at 13-14.

A. *Explaining the Reasons for Including Foreign Investment in EC IIAs*

Understanding the existence and scope of foreign investment provisions in EC IIAs requires looking firstly at the competence that the EC has in the field of foreign investment. Bearing in mind that the EC is a supranational organization with limited, attributable powers,[35] the scope of foreign investment provisions in EC IIAs depends primarily on the existence and exercise of EC competence in the field of foreign investment. As a result, the different scope of foreign investment provisions in EC IIAs is a result of the continuously evolving nature of EC competence and its effort to "substitute" its Member States in international foreign investment relations.

The EC Treaty (TEC) does not offer a specific legal basis enabling the EC to take external action in the field of foreign investment. Unlike trade, where the EC enjoys exclusive competence, its competence on foreign investment was limited[36] and still remains controversial.[37] The lack of an explicit legal basis on foreign investment has been the result of the reluctance of Member States to hand over to the EC any competence over foreign investment matters. Member States have consistently considered that international foreign investment regulation lies under their exclusive competence and have concluded massively BITs with third countries.

Nevertheless, the EC Treaty includes a number of provisions that enable the EC to take action and conclude international agreements with third countries in the field of foreign investment. The EC Treaty makes an explicit reference to foreign investment in Article 56 TEC on capital movements. However the scope of this provision is arguably limited only to the actual transfer of assets destined to be used for the establishment of an investor and not to the conditions of initial establishment as such.[38] Establishment of foreign investors is covered partially by Article 133 TEC on the Common Commercial Policy, since trade in services covers the commercial presence of foreign investors, while the Treaty provisions on establishment confer implied powers on the Community with regard to the initial establishment of foreign investors in all economic sectors.[39] Similar concerns exist also with regard to the post-establishment

[35] According to the principle of attribution, which is enunciated in Article 5 TEC, the EC shall act only within the limits of the competences conferred upon it by the Member States in the Treaty to attain the objectives set out therein.

[36] W. Shan, *Towards a Common European Community Policy on Investment Issues*, 2 JWIT 603 (2001); L. Mola, *Which Role for the EU in the Development of International Investment Law?*, Society of International Economic Law, Working Paper 26/08 (2008).

[37] For an analysis of EU competence over foreign investment under the current Treaty, the Constitutional Treaty and the Lisbon Treaty see: J. Ceyssens, *Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution*, 32 Legal Issues of Economic Integration 259 (2005); J. Karl, *The Competence for Foreign Direct Investment*, 4 JWIT 414 (2003). On the author's perception of the scope of Community competence over foreign investment see A. Dimopoulos, *The Common Commercial Policy after Lisbon: Establishing parallelism between internal and external economic policy?*, 4 Croatian Yearbook of European Law and Policy 101 (2008).

[38] For an analysis of the relevance of Article 56 TEC for foreign investment regulation see indicatively R Torrent, *Derecho comunitario e Inversiones extranjeras directas: Libre circulacion de los capitales vs. Regulacion no discriminatoria del establecimiento. De la golden share a los nuevos Open Skies*, 22 *Revista Espanola de derecho europeo* 291 (2007).

[39] In accordance with the doctrine of implied powers, the existence of EC implied powers in the field of foreign investment requires that regulation of the activity of third country nationals in the EU as well as of EU nationals in third countries is necessary for the attainment of the objectives of the internal market. In that regard, the competence to establish a uniform regulatory framework on the establishment of EU nationals in the EU

(*footnote continued on next page*)

treatment of foreign investors, where again the foundations of EC competence are rather obscure. Furthermore, the open-ended scope of the provisions on harmonization in the internal market could arguably enable the EC to regulate protection of foreign investment from expropriation, and the chapter on development cooperation adds another legal basis that could be used for inserting investment promotion provisions in EC IIAs.[40]

Given this patchwork of dispersed and limited competences, the EC has attempted to formulate its own, distinctive foreign investment policy, 'encroaching' gradually on Member States powers in the field. Using the legal tools which are available in the EC Treaty, the EC has formulated a legal framework for foreign investment, focusing initially in areas that were not covered by Member States' international agreements. In order to avoid the opposition of Member States, the EC considered its foreign investment policy complementary to that of the Member States, inserting provisions on issues such as capital movements and investment promotion as a field of development cooperation.[41] The EC has gradually expanded its foreign investment policy in other areas of foreign investment regulation, in particular concerning entry and operation of foreign investment. Given that EC competence in these fields is shared, the exercise of its competence plays an additional role, as it pre-empts Member States from taking any further action, thus rendering these aspects of foreign investment regulation under exclusive EC competence.[42] This growing internal power struggle between the EC and its Member States has been made explicit in practice, as the EC has challenged the conformity of Member States' BITs with EC law, thus questioning the scope and exercise of Member States' powers in the field.[43]

Apart from the internal struggle and the historical evolution of EC IIAs, another reason for the broad and different scope of foreign investment provisions in EC IIAs has been their incorporation in agreements serving broader external relations goals. Foreign

encompasses also the competence over the establishment of third country nationals, because otherwise divergent laws in the Member States setting different conditions for third country nationals could impede the effectiveness of the uniform provisions. With regard to the establishment of EU nationals in third countries, implied Community competence can be derived from the need to secure equal and non-discriminatory treatment of EU nationals in third countries via the conclusion of international agreements, as the latter has been recognized by the Court in the *Open Skies* cases (indicatively Case C-467/98 *Commission v. Denmark* [2002] ECR I-9519).

[40] For an overview of the possible legal bases enabling the EC to take action in the field of foreign investment see Dimopoulos, *supra* note 37, at 109-113.

[41] O. Babarinde & G. Faber, *From Lomé to Cotonou: Business as usual?* 9 EFA Review 27 (2004), at 33-35.

[42] EC competence in the field of the internal market as well as in the field of the Common Commercial Policy with regard to trade in services is shared with the Member States [M. Cremona, *A Policy of BITs and Pieces? The Common Commercial Policy after Nice*, 4 Cambridge Yearbook of European Law Studies 61 (2001), at 84]. It is rendered exclusive only after the EC has adopted common rules in the field and exclusivity is necessary to avoid any effect on the common rules which may result from autonomous action taken by the Member States (AETR-type exclusivity). For an analysis of AETR-type exclusivity see P. Koutrakos, *EU International Relations Law* (Oxford; Portland: Hart, 2006), at 84-88.

[43] In addition to the infringement proceedings that the EC has initiated against against Austria, Sweden and Finland for having concluded BITs that are incompatible with the EC Treaty (*supra* note 1), another example indicating the EC's interest in the field presents the Commission's insistence on the renegotiation of the BITs between the Member States that acceded in the EU in 2004 and the US. See Koutrakos, *supra* note 42, at 321-325; A. Radu, *Foreign Investors in the EU – Which "Best Treatment"? Interactions Between Bilateral Investment treaties and EU Law'*, 14 European Law Journal 237 (2008).

investment provisions are incorporated in agreements that have divergent objectives and aim at different levels of political, economic and social integration. As the EC has opted for broader association agreements dealing with a variety of external policy issues, regulation of foreign investment is only part of the broader framework, being influenced by the general objectives pursued. The EPA constitutes a prominent example, as it has been negotiated and concluded in the framework of the Cotonou Agreement,[44] which has been the last in a series of international agreements between the EC and African, Caribbean and Pacific countries. Considering the orientation of the EC external policy with regard to developing countries and its emphasis on their development and integration in the world economy,[45] it is understandable that the EPA places emphasis on the development aspects of foreign investment regulation.

In addition, the promotion of an innovative system of rules on foreign investment in EC IIAs is linked with the EC external policy objective to establish itself as an important actor in international economic relations. The scope of the foreign investment provisions found in EC IIAs illustrates the attempt of the EC to exert its own model of international economic regulation to its partners. By adopting a hub-and-spoke system, the EU takes advantage of its size and economic power in order to 'impose' on its partners international rules on foreign investment and gradually improve its international position, affecting future bilateral and multilateral agreements on foreign investment.[46] Considering the reluctance and resistance of states, and in particular developing countries, to assume further international obligations on foreign investment, the EU promotes a development-friendly legal framework, which arguably takes into account both the economic interests of capital exporting countries and the needs for development of capital importing countries.

B. *THE OBJECTIVES PURSUED BY THE FOREIGN INVESTMENT PROVISIONS OF THE EPA WITH CARIFORUM STATES*

The different content of the EPA can be better explained, if it is viewed in the context of the broader policy goals pursued by the EC. The establishment of international rules in areas of foreign investment regulation, which were traditionally considered to be under national control, indicates firstly that the EC promotes the internationalization of foreign investment rules. More importantly, the special weight attributed to promotion and entry of foreign investment and the elaborate system of rules established suggests that EC foreign investment policy is primarily oriented towards liberalization and development norms.

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[44] Partnership Agreement between the Members of the ACP Group of he one part, and the European Communities and its Member States of the other part, Cotonou, Benin 23.6.2000, OJ [2000] L317/3.

[45] On EU external development policy see Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy, "The European Consensus", OJ C46/1, Brussels 22.11.2005; K. Arts, *ACP-EU relations in a new era: The Cotonou Agreement*, 40 Common Market Law Review 95 (2003).

[46] M. Trebilcock & R. Howse, *The Regulation of International Trade* (London: Routledge, 2005), at 385-387.

Beginning with the internationalization of foreign investment rules on admission and operation of foreign investment, EC IIAs take into account the realities of the global economy, which exists beyond national borders. The internationalization of foreign investment rules is considered as an effective means for addressing the problems and the concerns that foreign investment activity raises. More specifically, the establishment of international rules serves primarily the need of foreign investors and capital exporting countries for legal certainty and efficient and transparent regulation. The adoption of substantive international rules brings about standardization of the regulatory framework, enhancing its simplicity and, consequently, strengthening the confidence of foreign investors.[47] In addition, the establishment of a framework clarifying the relevant national rules enhances the transparency of the national system and adds to its efficient application by national administrations. Furthermore, the internationalization of foreign investment rules gives the opportunity to national policy makers in host countries to review and modernize their national legislation, in particular in developing countries lacking the required expertise, which can benefit from the internationalization of foreign investment rules.

Moreover, internationalization of rules on admission and treatment of foreign investment is in many circumstances an optimal way for balancing the divergent interests of capital importing, capital exporting countries and foreign investors. They give the opportunity to raise the concerns of all relevant actors and to achieve a balance between promotion and protection of foreign investment, thus avoiding the need to resort to unilateral measures in order to support their respective interests.[48] The EPA illustrates the attempt to ensure a balance of interests: for example it promotes the interests of foreign investors by offering them market access and other benefits, it enables capital exporting countries to further their economic development by providing for repatriation of profits and it incorporates the concerns of capital importing countries that their public policy objectives are not obstructed, so that foreign investment activity is beneficial for them.

Turning now to the shift of emphasis from investment protection to promotion and liberalization, it appears that the EC aims in its international agreements to address the economic interests of foreign investors, home and host countries. With regard to the interests of foreign investors, EC IIAs and the EPA in particular recognize the ever-growing importance of market access as a major regulatory determinant of investment decisions.[49] Liberalizing the conditions for entry of foreign investment and regulating important aspects of its operation, such as the employment of key personnel, the EPA aims to increase the attractiveness of countries as investment locations, thus shaping foreign investors' preferences.

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[47] Salacuse & Sullivan, *supra* note 10, at 95-96.

[48] B. Hoekman & R. Newfarmer, *Preferential Trade Agreements, Investment Disciplines and Investment Flows*, 5 Journal of World Trade 949 (2005), at 949-950.

[49] S. Szepesi, *Comparing EU Free Trade Agreements: Investment*, InBrief 6D of European Centre for Development Policy Management, available at www.ecdpm.org (last visited 18th November 2009).

The shift towards liberalization reflects also the interests of states to provide access to their nationals to third country markets and to increase competition in their domestic markets. The opening of third country markets to EU nationals has been explicitly considered a fundamental objective of EU external commercial policy, reflecting the belief that access to third countries' markets will enhance the global competitiveness of European companies, enabling them to survive and achieve greater profits in an increasingly open and competitive global economic environment.[50] Furthermore, the adoption of an open market access regime signifies the end of protectionism of national entrepreneurs, which distorts competition, allowing only for exceptions in sensitive sectors, where state intervention is considered necessary for protecting security or other strategic interests.[51]

In addition, the achievement of healthy competition conditions is also pursued through the establishment of minimum standards. They latter serve a double role, as they also enable host countries to develop and improve their domestic level of labor, environmental and health protection. Although, the adoption of such standards may be burdensome for developing host countries, they still enjoy the flexibility to adjust their regulatory regime according to their needs. Bearing in mind that host countries can effectively pursue public policies without infringing the provisions of EPA using the exception mechanism, this leaves great leverage to host countries to construe and implement national policies beneficial for their development.

Lastly, the inclusion in EC IIAs, and in the EPA in particular, of investment promotion in the framework of development cooperation exemplifies the EU commitment towards contributing to the development of developing countries, enabling the latter to build up the institutional capacity to attract and increase benefits from foreign investment activity. The EPA appears to fit perfectly to the development orientation of EU external economic policy towards developing countries, reaffirming the adherence to the principles of sustainable development in practice.[52] From the perspective of developing countries, the EPA puts in an international legally binding framework the means and objectives of EU development aid, which by targeting at foreign investment promotion improves their potential to benefit from foreign investment.

To sum up, the inclusion of foreign investment provisions in EC IIAs serves a plurality of goals, divergent in their nature and orientation. While the achievement of political goals aiming at increasing EU presence in the field of foreign investment regulation both internally and externally should not be underestimated, the scope and content of EC IIAs is determined by their specific goals as well. EC IIAs consider the adoption of international rules as a better means of regulation than national legislation,

[50] Commission Communication, *Global Europe: Competing in the World*, COM (2006) 567, Brussels 4.10.2006.
[51] Ibid., at para. 3. l (ii).
[52] R. Williams, *Community Development Cooperation Law, Sustainable Development, and the Convention on Europe – From Dislocation to Consistency?* 4 Oxford Yearbook of European Environmental Law 303 (2005).

while they place emphasis on liberalization and development. Although this shift in regulatory priorities is not a unique characteristic of EC IIAs, they are distinguished from other IIAs: by viewing these objectives through the prism of the broader EC external relations goals, EC IIAs recognize the challenges from the interaction and attempt to balance the potentially conflicting goals of liberalization and sustainable development. Their aim to increase foreign investment activity and to secure that such activity will be beneficial for all relevant actors suggests that the EC intends to assume a pioneer role in the formation of innovative international investment norms rather than merely following the trends set by other IIAs.

IV. DO EC IIAS ACHIEVE THEIR OBJECTIVES?

Having established that EC IIAs aim at increasing foreign investment flows and ensuring benefits from foreign investment activity for host countries, we have to examine whether their provisions are capable and sufficient to achieve these goals, addressing the criticisms raised against the majority of BITs. Focusing on the needs and concerns of developing countries and using the EPA as an example, this part looks mainly at how the legal framework on foreign investment incorporates development considerations in international foreign investment regulation. In that respect, the effects of the general development objectives and principles of the EPA on foreign investment are explored initially, followed by an analysis of the development orientation of the substantive provisions liberalizing foreign investment. Afterwards, the provisions requiring and enabling host states to adopt public policy measures are scrutinized and, finally, the suitability and effectiveness of the rules on investment promotion are considered.

A. *THE PRINCIPLES AND OBJECTIVES OF THE EPA*

Contribution to the sustainable economic, social and environmental development of CARIFORUM States is a principal objective of the EPA as well as of the Cotonou Agreement, which the EPA implements. It is noteworthy that the EPA stresses the role of sustainable development as an objective "*to be applied and integrated at every level of their economic partnership"*, which is also reiterated as the main objective of the chapter on foreign investment.[53] The recognition of sustainable development as an objective of the EPA has important implications for its investment regime. As the objectives of international treaties establish a relevant context for the interpretation of the other provisions of the treaty,[54] it is arguable that sustainable development principles influence the application and interpretation of foreign investment norms. As a result, the EPA

[53] Articles 3 and 60 of the EPA.

[54] Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

requires that regulation of foreign investment and in particular its liberalizing provisions contribute to the sustainable development of CARIFORUM States.

In addition to sustainable development, the EPA introduces human rights, democracy and good governance as its basic principles and as an essential element of the agreement.[55] This provision establishes a strict obligation to respect human rights[56] and it is complemented by a non-execution clause, which allows parties to take appropriate unilateral measures, if the other party fails to fulfill its human rights, democracy and good governance obligations.[57] As a result, the preliminary conclusion can be drawn that foreign investment activity pursued under the EPA shall respect human rights, democracy and good governance, as otherwise the host state can be sanctioned for not complying with its human rights obligations. Furthermore, the threat of suspension of favorable provisions can also act preventively; it discourages developing countries from lowering or waiving their human rights obligations in order to encourage foreign investment and it deters EU investors from "violating" human rights in the course of their activities in the host country, as the suspension of trade and investment provisions would result in the loss of the preferential treatment upon which their establishment was based.

Nevertheless, these provisions do not seem suitable to address effectively the development concerns that liberalizing foreign investment regulation raises. With regard to the objective of sustainable development, it is unclear whether it can be used in practice for guaranteeing the development orientation of foreign investment. Given that the development effects of foreign investment activity cannot be practically judged *in abstracto* and *a priori*, excluding foreign investors from the beneficial scope of foreign investment provisions, the objective of sustainable development obtains an important role only *ex post facto*, in cases where the actual impact of foreign investment activity on development is questioned under dispute settlement proceedings. But even in such cases, the contested and vague nature and normative content of sustainable development may discourage dispute settlement bodies from using this principle as an interpretative tool.[58]

Similar concerns arise also with regard to human rights conditionality, which is more of a political mechanism used by the EU to "sanction" third countries for severe violations of human rights and not a legal instrument allowing for an automatic response to specific human rights violations resulting from foreign investment

[55] Article 2 provides that the EPA "is based on the Fundamental Principles as well as the Essential and Fundamental Elements of the Cotonou Agreement, as set out in Articles 2 and 9, respectively, of the Cotonou Agreement", thus incorporating these provisions in its text.

[56] For an analysis of the obligations established by essential elements clauses see L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (New York: OUP, 2005), at 93-106; E. Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (The Hague; London: Martinus Nijhoff, 2003), at 213.

[57] For an analysis of the suspension mechanism under human rights clauses see: A. Rosas, 'Human Rights in the External Trade Policy of the European Union' in *World Trade and the Protection of Human Rights. Human Rights in Face of Global Economic Challenges*, Publications de l'Institut International des Droits de l'Homme (2001), at 193; M. Cremona, 'Human Rights and Democracy Clauses in the EC's Trade Agreements' in N. Emiliou and D. O'Keefe (eds.) *The European Union and World Trade Law* (Chichester; New York: Wiley, 1996), at 62.

[58] On the clarity of the normative content of sustainable development in international and EU law see M-C. Cordonier-Segger & A. Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford; New York: OUP, 2004) chapter 3; Williams, *supra* note 52.

activity.[59] The unsuitability of the suspension mechanism for addressing development concerns of investment activity is also illustrated by the fact that the investment activity that could raise human rights concerns is based on the provisions of the EPA, the inclusion of which the EU has strongly supported and insisted on. Thus, the imposition of sanctions would condemn a developing country for actions of foreign investors, instead of contributing to the amelioration of human rights, democracy and governance conditions in the host state.

B. *THE DEVELOPMENT ORIENTATION OF LIBERALIZING PROVISIONS*

The development needs and concerns of host states are better incorporated in the substantive provisions concerning entry and operation of foreign investment. Starting with the provisions on capital movements, the EPA provides for complete liberalization of capital movements related to foreign direct investment, thus reflecting the belief that the free movement of capital is a prerequisite for an increase of foreign investment flows and, consequently, economic growth. Besides, it allows for the adoption of safeguard measures limiting capital movements in order for economic and monetary goals to be served under exceptional circumstances. Even though this exception recognizes specific public interests that might result in a legitimate restriction of capital movements, it does not allow restrictions on outward investment from developing countries. This approach is in contrast with prior EC IIAs that enabled EU counterparties to maintain restrictions on outward investment, which were considered necessary for boosting the local economy of developing countries by stimulating domestic investments and avoiding the negative for their development consequences arising from capital exports.[60] However, the EPA endorses a liberal approach towards outward investment, considering that liberalization can result in benefits for developing countries similar to those that developed countries enjoy. Given that the number of globally competitive firms from developing countries is constantly increasing, it can be in the interest of developing countries to allow them to invest abroad, resulting in positive externalities for the home state.[61]

The development dimension of liberalizing provisions is better illustrated in the chapter dealing with entry and treatment of foreign direct investment. In contrast with BITs regulating entry of foreign investment, the EPA follows the example of the GATS, requiring that the parties make market access and national treatment commitments, determining themselves the sectors and the forms of entry and operation of foreign investment that are liberalized. As a result, the EPA adopts a "positive list" approach to liberalization and aims

[59] Bartels, *supra* note 56, at 35-40.

[60] See for example the EMAs with Algeria, Morocco and Tunisia; S. Fares, *Current Payments and Capital Movements in the EU-Mediterranean Association Agreements*, 30 Legal Issues of Economic Integration 15 (2003), at 23-24.

[61] For an analysis of the policy concerns on outward investment from developing countries see T. Moran, 'What policies should developing country governments adopt toward outward FDI? Lessons from the experience of developed countries', in Sauvant, Mendoza &Ince (eds.) *The Rise of TNCs from Emerging Markets: Threat or Opportunity?* (Cheltenham: Edward Elgar, 2008) chapter 13.

at the gradual liberalization of investment rules, thus enabling developing countries to set their priorities and promote their development policies.[62] Of course, this intermediate position is subject to criticisms, as it could be argued that the EPA creates an inflexible liberal regime, which does not take into account the changing priorities of developing countries,[63] or that it encourages protectionism in sectors where liberalization can bring positive effects. Despite these criticisms, the EPA appears to adopt a balanced approach towards liberalization, as it provides an institutional framework for addressing such policy concerns, which can eventually lead to informed changes in the list of each party's commitments. Part V of the EPA includes institutional provisions establishing a number of specific institutions which are assigned with the task, among others, to assess the development impact of liberalizing foreign investment commitments.[64]

The development orientation of the liberalizing provisions of the EPA is also strengthened by the fact that it does not include a general prohibition on performance requirements, but includes them into its positive list scheme with regard to entry and treatment of foreign investment. Recognizing that host countries may acquire significant benefits from the imposition of trade, competition and other performance requirements,[65] the EPA enables host states to make qualified market access and national treatment commitments in specific sectors, thus being able to target foreign investment activities that can contribute to their economic development.

At this point it should be mentioned that the development effect of foreign investment liberalization is maximized as a result of the regional trade integration that the EPA simultaneously pursues. The EPA sets the foundation for the achievement of regional integration among the CARIFORUM States, which is considered as "*a mechanism for enabling these States to achieve greater economic opportunities, enhanced political stability and to foster their effective integration into the world economy*"[66] As a result, the creation of larger markets will provide great business opportunities and generate more foreign investment, addressing an important economic determinant of market-seeking foreign investors. Even though regional integration may initially lead to winners and losers within a region due to inter-and intra-regional capital flows, thus depriving certain countries from foreign and domestic capital,[67] it is expected that any losses suffered by certain countries will be only short term, as financial and technical aid can help them transform their economy into a competitive economy of scales.[68]

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[62] Sauve & Ward, *supra* note 22, at 56; teVelde and Bilal, *supra* note 33, at 215-216.

[63] C. Nwobike, *The Emerging Trade Regime under the Cotonou Partnership Agreement: Its Human Rights Implications*, 40 Journal of World Trade 291 (2006), at 312-313.

[64] The CARIFORUM-EC Trade and Development Committee is assigned with the task to monitor and assess the implementation of the agreement on sustainable development (Article 230.3.(a)), assisting the Joint CARIFORUM-EC Council in taking binding decisions concerning the operation and implementation of the agreement.

[65] On the benefits that performance requirements may have on host state development see UNCTAD, *FDI and Performance Requirements: New Evidence from Selected Countries* (New York; Geneva: UN Publications, 2003).

[66] Article 4 of the EPA.

[67] G. Faber, 'Economic Partnership Agreements and Regional Integration' in Babarinde & Faber (eds.), *The European Union and Developing Countries The Cotonou Agreement* (Leiden; Boston: Martinus Nijhoff, 2005), at 92-94.

[68] Sauve & Ward, *supra* note 22, at 57; teVelde & Bilal, *supra* note 33, at 215-216; Faber, *supra* note 67, at 88-91.

Although the EPA establishes a legal framework on liberalization that allows for development concerns to be taken into consideration, its success depends ultimately on the political choices determining the level of commitments of each country and their implementation.[69]

C. *PUBLIC POLICY CONSIDERATIONS*

In addition to the promotion of market openness and competitiveness, the EPA takes cognizance of the negative effects that liberalization may bring about and aim to maximize the benefits from investment inflows and mitigate its negative effects. Ascribing to the goals of social justice and cohesion and the protection of consumers' economic interests, the EPA incorporates exceptions and limitations to liberalization that serve public policy interests. It is worth pointing out that the public policy goals served by the investment provisions of the EPA do not only aim to "shield" the European internal market and EU nationals, but they also have a strong development dimension, contributing equally, if not more, to the protection of public interests in third countries, which can be threatened from the use of the liberalizing provisions by European investors in order to enter and operate in their market.

The emphasis placed on the development dimension of foreign investment provisions is highlighted by the introduction of the provisions on investors' behavior and maintenance of standards. Considering firstly the provision on investors' behavior, the wording of Article 72 of the EPA leaves little doubt that it establishes minimum labour and environmental standards. Not only does it recognize the right of the parties to pursue policies that ensure these standards, but it also imposes an obligation on them to take the appropriate and necessary measures. By linking minimum labour and environmental standards to international law instruments binding on the Parties, it allows for environmental and labour law considerations to be taken into account when foreign investors' rights and obligations are determined. As a result, it could be argued that the EPA takes a step further than most IIAs by incorporating in a legally binding instrument certain principles of corporate social responsibility that until now were adopted by investors on a voluntary basis.[70] Without imposing direct obligations on private individuals, which would be controversial under public international law,[71] the EPA text is carefully drafted so that it introduces basic limits on foreign investment activity.

Moreover, the provision on maintenance of standards requires that the Parties do not encourage foreign investment by lowering domestic standards. Even though similar

[69] For an overview of the commitments undertaken by the EC and CARIFORUM countries and their comparison to the Parties' GATS commitments see: Sauve & Ward, *supra* note 22, at 24-33.

[70] Voluntary codes of corporate social responsibility present for example the *UN Code of Conduct for Transnational Corporations* (1986) and the *OECD Guidelines for Multinational Corporations* (1972 as amended in 2001). For a discussion of voluntary codes see F. McLeay, 'Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: a Small Piece of a Larger Puzzle' in DeSchutter (ed.), *Transnational Corporations and Human Rights* (Oxford; Portland: Hart, 2006), at 219-241.

[71] O. DeSchutter, 'The Challenge of Imposing Human Rights Norms on Corporate Actors' in DeSchutter (ed.), *Transnational Corporations and Human Rights* (Oxford; Portland: Hart, 2006), at 1-43.

provisions are found in other IIAs, such as Article 1114 NAFTA and Articles 12 and 13 of the US Model BIT, the EPA presents significant innovations, adopting a much stronger wording, as it does not provide an appeal to the Parties' "best efforts", but obliges them to avoid lowering their national standards. Besides, the EPA broadens the scope of public policy concerns that are linked with foreign investment, including next to environmental and labour standards social, health and cultural concerns.

In addition to the respect for national and international standards, the EPA includes another mechanism enabling host countries to raise their development concerns and pursue public policies in conformity with their foreign investment commitments. The EPA provides in Article 224 a general exception from the application of the investment provisions, allowing the Parties to adopt proportionate and non-discriminatory measures that are necessary to protect and secure public morals, the public order, human, animal or plant life or health, exhaustible natural resources national cultural treasures and other public policy objectives. Adopting a similar wording to Article XX GATT and Article XV GATS, the EPA is among the few IIAs that extend the scope of such exception to investment provisions, thus allowing the Parties to invoke its application for derogating from liberalization rules.[72]

Despite the innovative content of these provisions, it is arguable that they do not fully address the development concerns of CARIFORUM States. The EPA does not include the proper mechanisms for ensuring that the civil society can effectively raise development concerns, which has to rely on home or host state action. A manifest example of the incomplete system of the EPA is that if the provisions on investors' behaviour and maintenance of standards are breached, the persons that are directly affected are not provided with any means for demanding the enforcement of these provisions, as such violations may be economically beneficial for both the host and the home state and its investors. Moreover, the general exception provision raises similar concerns to those that have been raised in the framework of the WTO concerning the interaction between trade and development.[73] Considering national preferences and public policies as exceptions to liberalization minimizes the discretion enjoyed by national governments to determine and pursue their national development interests. The EPA adopts the traditional trade approach regarding the relation between foreign investment and development, granting on the one hand deference to national governments to determine their public policies, but subjecting them to the scrutiny of dispute settlement bodies in accordance with overarching international norms.

[72] For an overview of the different exception provisions relating to the preservation of public policy interests that are found in BITs see UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (New York; Geneva: UN Publications, 2007), at 87-90, 93-99.

[73] For an overview of the debate on trade and development in the WTO see: M. Gehring & M.-C. Cordonier Segger (eds.), *Sustainable Development m World Trade Law* (The Hague: Kluwer Law International, 2005) and in particular chapters 3, 5 and 6.

D. *INVESTMENT PROMOTION AS PART OF DEVELOPMENT COOPERATION*

Last but not least, the inclusion of investment promotion provisions in the EPA in the framework of development cooperation confirms the orientation of the EPA towards sustainable development. As was aforementioned, the EPA provides for technical and financial assistance to CARIFORUM States intending to help them improve their regulatory regimes and enhance their institutional capacity to attract and benefit from foreign investment. Hence, the EPA addresses the potential lack of financial and human resources on the part of developing countries, and establishes a firm commitment on the part of the EC for development aid. The EPA links development cooperation with the EU instruments of financial and technical assistance,[74] such as the European Development Fund (EDF),[75] so that CARIFORUM States can use the instruments of EU development aid for promoting foreign investment. Besides, the EPA provides a general framework for cooperation, indicating the priorities and the tools that can be used for promoting foreign investment in the framework of development cooperation.[76]

Moreover, the EPA addresses a number of concerns that are raised by the inclusion of foreign investment promotion provisions in IIAs.[77] Firstly, the EPA includes a mechanism ensuring the effectiveness of development cooperation; the EPA establishes an institutional framework, namely the EC-CARIFORUM Trade and Development Committee, which is responsible, among others, for monitoring development cooperation and making recommendations concerning new cooperation priorities.[78] Secondly, the EPA grants the flexibility to host states to determine themselves the specific investment promotion measures that they deem suitable and necessary. Without entering into a detailed regulation of the measures that CARIFORUM States should adopt in order to attract and benefit from foreign investment, such as investment incentives or specific performance requirements targeted at specific foreign investment activities, the EPA provides only a general, but sufficient framework for co-operation. Finally, the EPA, through its direct link with EC development cooperation policy, promotes outward investment from EU nationals to CARIFORUM States as well. The EDF includes a specific instrument focused on promotion of foreign investment, the Investment Facility, which provides venture capital, ordinary loans, guarantees and interest subsidies for investment projects in ACP countries, financing high quality and productive infrastructure.[79]

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[74] Article 7(3) of the EPA.

[75] For an overview of the EDF structure and scheme see Babarinde & Faber, *supra* note 41, at 33-35, 38-42. For an analysis of its current implementation and allocation of funds see Commission Communication, *Regional Integration for Development in ACP Countries* SEC (2008) 2538, Brussels 1.10.2008.

[76] Article 121. See also Sauve & Ward, *supra* note 22, at 44-47.

[77] For an analysis of the policy implications arising from the inclusion of promotion provisions in IIAs see UNCTAD, *Investment Promotion Provisions in International Investment Agreements* (New York; Geneva: UN Publications, 2008), at 7-12 and 65-68.

[78] Article 230 (3) of the EPA.

[79] For an analysis of the Investment Facility see European Investment Bank, *Investment Facility Annual Report* (2007).

V. Concluding Remarks

EC IIAs, as exemplified by the EPA, present the attempt by the EU to readdress the balance between the objectives of international regulation of foreign investment, raising significant concerns that have been neglected so far by BITs. The EPA illustrates the effort to introduce in IIAs new provisions and improve existing ones, by taking into consideration the interests of foreign investors, home and host states and establish a nuanced balance between divergent interests. The foreign investment regime of the EPA is based on two, equally important objectives, namely liberalization of foreign investment conditions and sustainable development. Addressing the demand for increasing investment flows, the EPA creates a favorable regulatory environment by liberalizing entry of foreign investment and including commitments concerning investment promotion. This effort is complemented by a network of provisions which aim to guarantee the sustainable development orientation and effectiveness of foreign investment provisions, so as to ensure the maximization of benefits from foreign investment.

Despite the innovations of the foreign investment regime, the EPA is far from establishing a complete system of foreign investment rules and remains silent on crucial aspects of foreign investment regulation that can improve its development potential. The lack/ambiguity of internal competence obstructs the EU from inserting in its IIAs provisions on investment protection, which are indispensable for a complete system of foreign investment rules. Even though the Lisbon Treaty introduces a new competence on foreign direct investment, it is unclear whether the EU will replace Member States' BITs with EU IIAs and if so, whether investment protection norms will be subject to similar "development-friendly" guarantees. Nevertheless, despite all its deficiencies, the EPA is one of the most significant efforts so far in the field of international foreign investment regulation to address the aims of promoting foreign investment and balancing divergent interests, setting a standard for comparison with existing and future agreements.